IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 333.

IRENE NUNNERY THERIOT, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY BRIEF.

The Commissioner's brief (p. 12) states:

"Here, taxpayer kept no books of her own at any time, and had established a calendar year basis for income-computing accounting period purposes."

The Commissioner, despite the quoted statement does not attempt to assist this Court by explaining how, in the light

of this statement, the Commissioner (1) used the community books to compute the amount of the taxpayer's income and (2) used the accrual method of accounting in so computing income. This is important because, prior to her marriage, the taxpayer as a wage earner kept no books so reported income on the cash and calendar year basis.

Summarized, the Commissioner insists that the taxpayer kept no books and, therefore, must adhere to her prior practice of reporting on the calendar year basis, but, at the same time, says he will compute the income from the community books kept on the accrual method. All authority is that, if income is computed from books, the books must be followed, both as to method of accounting and fiscal year. The Commissioner tries to get around this situation by not making one word of argument with respect to it. The Commissioner, in order to exact taxes not due, seeks to here ignore the books for the purpose of determining the fiscal period to be used, but to recognize them for purposes of computing the amount of income and the use of the accrual method of accounting in computing the said amount.

The Commissioner argues, by inference at least, that the community books are not the wife's books when she had no income except community income. (Resp. Br. 8) The Circuit Court of Appeals states (R. 64):

> "It is true that in this case *all of the taxpayer's income* was her community share of the income of her husband, which *was computed from the books* of her husband's business, and it would *appear entirely unrealistic* for the taxpayer to have kept any books other than the community books. * * * " (Italics supplied)

In view of the quoted statement, it is difficult to state that the taxpayer had no books. What the Commissioner and the Courts below really say is that she had books for every purpose except when having books would do her some good taxwise.

The Commissioner has always recognized that community income must be reported in the same manner by both husband and wife. In O.D. 909, 4 C.B. 254 (1921) it is stated:

> "In returns in which community income is divided between husband and wife domiciled in States where such income is divisible for income tax purposes, both husband and wife should report in detail the gross income from such community property. The deductions properly chargeable against such income should be equally divided between husband and wife."

The Courts have uniformly followed the rule of O.D. 909. In *Stewart* v. *Commissioner*, 35 BTA 406, aff'd (CCA 5, 1938) 95 F. (2d) 821, 21 AFTR 20, the Court pointed out that in dealing with separate returns in a community property state:

> "Income and deductions (of husband and wife) must be accounted for on the same basis."

In the case at bar, the Commissioner is arguing that the quoted rule is to be applied to the extent it increases the tax and not applied when it reduces the tax.

Cf. *Howard* v. *United States* (D. C. La. 1941), 40 F. Supp. 697, 28 AFTR 133, aff'd (CCA 5, 1942) 125 F. (2d) 986, 28 AFTR 1198. In the *Howard* case, both courts held that the payments made from bank accounts standing in a husband's name were, as a matter of law, the same as though the accounts stood in the name of both spouses.

The cases relied upon by the Commissioner have no application to the case at bar. For instance, *Riley Co.* v. *Commissioner*, 311 U. S. 55, involved a situation where a mining corporation filed a tax return before it knew of a recently enacted provision of the Revenue Act allowing it to take percentage depletion if an election were made on the "first return." This Court held that a "first return" having been made, the literal meaning of the statute must be followed and that an amended return making the election could not be filed.

The *Riley* case supports taxpayer's contention that the literal language of the Internal Revenue Code must be followed, i.e.:

(1) That it is mandatory that taxable income be computed on the basis of taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer.

(2) That it is mandatory that individual tax returns show all items of income and deduction.

Lazard v. *Commissioner*, 5 T.C. 277, aff'd 153 F. (2d) 348, *Guste* v. *Commissioner*, 8 T.C. 1261, and other partnership cases cited by the Commissioner are not applicable because they involve partnerships. Partnerships are required:[1]

(1) To compute partnership income.

(2) To file returns showing:

(a) All items of income of the partnership;

(b) All items of deduction of the partnership;

(c) The portion of net income of the partnership allocable to each partner.

In addition, the Internal Revenue Code specifically recognizes that members of partnerships may have different taxable years than the partnership of which they are members.[2]

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[1] Sections 181-184, Internal Revenue Code.

[2] Sec. 188, I.R.C. Different Taxable Years of Partner and Partnership.

If the taxable year of a partner is different from that of the partnership, the inclusions with respect to the net income of the partnership, in computing the net income of the partner for his taxable year, shall be based upon the net income of the partnership for any taxable year of the partnership (whether beginning on, before, or after January 1, 1939) ending within or with the taxable year of the partner.

The foregoing provisions relating to partnerships do not apply to marital communities.

CONCLUSION.

There is direct conflict between the case at bar and the cases cited in the petition for certiorari. If these conflicts are not resolved, the only effect of the decision in this case will be to breed litigation.

Respectfully submitted,

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November 4, 1952.